Supreme Court, U.S.
FILED
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No. ———

In The
Supreme Court of the United States

CLIENTS AND FORMER CLIENTS
OF BARON & BUDD, P.C.
and
OCCUPATIONAL MEDICAL RESOURCES, INC.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. In 28 U.S.C. § 1407, the federal multidistrict litigation statute, does the "plain meaning" of the phrase "pretrial deposition" include a FED. R. CIV. P. 45 document subpoena?

2. Given the command of FED. R. CIV. P. 45 that a motion to quash a document subpoena shall be heard by "the court by which a subpoena was issued," can that court instead remit, refer or transfer the motion to quash to a different federal district court?

PARTIES TO THE PROCEEDING

Petitioners

Alexander, Raymond D.; Arroyo, Moises Romero; Arteaga, Serapio; Banks, Pearlean D.; Barnes, Erma J.; Bell, Helen J.; Blalock, Gerald J.; Boone, Johnnie Mobley; Boyd, Inell; Breshears, Jerrian Henry; Brown, L.C.; Brown, Della M.; Brown, Nina Faye Forte; Brown, Edward S.; Buckner, J.W.; Burleson, Billy L.; Caldwell, Floyd Edward; Caldwell, Wilbert; Casteel, Eddye; Cervantes, Arnulfo L.; Chamblee, Jacob, Jr.; Chatman, Pearlie M.; Chatman, Gloria Dean; Cherry, James C.; Collier, Patricia A.; Cook, James T.; Cook, Wilma J.; Culberson, Bobbie Earl; Culberson, Dianna; Dimsdale, Gladys Wilson; Dixon, Jaoler, Jr.; Dunn, Ruthie M.; Durrett, John Bunyon, Jr.; Edwards, George Lanta; Ellis, David Louis; Ellis, Billy C.; Ellis, Edna Marie; English, George Howard; Esmon, William Ray; Evans, Pearlie Mae; Ferrell, Elva W.; Fields, J.E.; Flournoy, Bobby Ray; Fonfara, Jimmy Donald; Ford, Clearthur, Jr.; Forte, Ulycess; Frazier, Ruby L.; Freeman, Gerald; Gamble, Vernita J.; Garrett, Gilbert C.; Gipson, Margaret A.; Givens, Linda Marie; Godfrey, Arxavia Earl; Golston, Caroline L.; Gooden, Nannie M.; Goodwin, James Clifford; Green, John M.; Hamilton, Erwin; Hampton, Melton; Hancock, George M.; Harris, Jimmie M.; Harris, Virgie Marie; Harris, Elnora; Hatridge, Minnie Pearl; Hawkins, Carrie M.; Hawkins, Nathaniel; Hawkins, Edgar; Hearon, George; Henderson, Minnie Frances; Hicks, Michael Dale; Hubbard, Crystle E.; Huey, Dorothy Lee; Humber, Billy R.; Humes, Charles Edwin; Hunter, Craig A.; Jefferson, Ammie; Jenkins, George Edward; Jett, Carolyn F.; Johnson, Otis; Johnson, Paul; Johnson, Dorothy O.; Johnson, James A., Sr.; Jones, Mary E.; Jones, Jewel O.; King, Arlon Ray; Knox, Roy; Korkmas, Patrick

PARTIES TO THE PROCEEDING – Continued

Ellis; Lacy, Albert; Lee, Roosevelt; Lisenby, Anita Kay; Magee, John Wayne; Mass, Robert L.; Mayfield, Earl, Jr.; McBryde, Kyle L.; McCoy, Jerry M., Jr.; McGraw, Willie; McIntyre, M.G.; Medina, Marcos, Jr.; Miller, James D.; Moore, Sam C.; Murray, Kenneth Carl; Nash, Paul Randolph; Neal, James Franklin; Nero, Minnie; Nero, R. Lee; Noiel, Leon; Oliver, Edward Hilton; Owens, Ophelia T.; Pinkney, Harvey; Powell, Willis; Riley, Albert D.; Riley, Jerlene; Roberson, Douglas; Sanders, Verna M.; Schutte, Donal Ray; Scott, Odell Pat; Scott, Leonard Ray; Scott, Don Ray; Sewell, James Richard; Shavers, Nellie Joyce; Sheets, Gerald M.; Simmons, Ronald, Sr.; Simmons, Clayton A., Sr.; Sims, Mollie; Smith, Scott Vann; Smith, Ella Rose; Smith, John W.; Smith, Dorothy Lou; Spencer, Charles D.; Stanfill, Charles Edward; Steele, Lester Joe; Stephens, Billie Frances; Stewart, Erna Murray; Stigers, Melba J.; Summers, Merdie M.; Tapia, Celio; Thomas, Linda Browning; Thompson, Mary; Thurman, Ella Mae; Tolbert, Ann E.; Tuck, Billy Earl; Tucker, Lester Jarvis; Veasey, Kenneth R.; Walker, Rosie Lee; Walker, Richard Larry; Ward, James; Ware, Rosie Lee; Watkins, Melvin Ray; West, R.C.; Westberry, James H.; Williams, Flora Jean; Williams, Oscar Willie; Williams, Dorothy N.; Williams, Henry J.; Williams, Charles W.; Williams, Heinz Arno; Williams, R.C., Jr.; Winget, Clell Hammer; Wood, Robert Wesley; and Wright, Charles Wayne; Occupational Medical Resources, Inc.

Nominal Respondent

The Honorable Vanessa D. Gilmore, United States District Judge

PARTIES TO THE PROCEEDING – Continued

Respondents

A.R. Wilfley & Sons, Inc.; Accurate Felt & Gasket Co., Inc.; Allied Glove Corporation (also known as Nationwide Glove Corporation); Amsted Industries, Inc.; Baldor Electric Company; Bondex International, Inc.; CertainTeed Corporation; Chemtura Corporation; Cooper Alloy Corporation; Crossfield Products Corporation; Eastern Safety Equipment Company, Inc. (also known as Aearo Company); Flexo Products, Inc.; Gardner Denver, Inc.; General Electric Company; Georgia-Pacific Corporation; The Gorman-Rupp Company; Gulf Coast Marine Supply Company; Pulsafeeder, Inc.; Viking Pump Company; Warren Rupp, Inc.; Illinois Tool Works Inc.; Ingersoll-Rand Company; Lawrence Pumps, Inc.; Magnetrol International, Inc.; Marine Specialty Company, Inc.; Mueller Steam Specialty; National Service Industries, Inc. f/d/b/a North Bros. Company; Owens-Illinois, Inc. d/b/a O-I; Pecora Corporation; Pneumo Abex, LLC; Rogers Corporation; Sager Glove Corporation; Aurora Pump Company; BIF; DeZurik, Inc.; Layne & Bowler Pump Group; Marsh Instruments; Standard Equipment Company, Inc.; Terex Corporation; Terex Cranes, Inc.; The American Crane Corporation; Turner Supply Company; Union Carbide Corporation; Amchem Products, Inc.; Warren Pumps, LLC; Yeoman's Chicago Corporation (also known as "Chicago Pump Company" or "Morris Machine Works/Morris Pumps"); Yuba Heat Transfer

CORPORATE DISCLOSURE

The Petitioners are individuals, and Occupational Medical Resources, Inc. There is no parent corporation or publicly held company owning 10% or more of the stock of Occupational Medical Resources, Inc.

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MISCELLANEOUS

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OPINIONS BELOW

The original panel opinion of the court of appeals is published at 478 F.3d 670, and is found at App. 1-4. The order of the court of appeals denying the petitioners' motion for rehearing and rehearing *en banc*, and the dissenting opinion from denial of the motion for panel rehearing is published at ___ F.3d ___, 2007 WL 898820, and is found at App. 5-15. The orders of the district court in Texas refusing to entertain the motions to quash and directing the petitioners to proceed instead in the multi-district litigation court in Pennsylvania are found at App. 16-17.

JURISDICTION

The court of appeals' order denying the motions for rehearing were issued on March 27, 2007. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1). In *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), this Court exercised certiorari jurisdiction over a mandamus order of a court of appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Appended as App. 18-22 are 28 U.S.C. § 1407 and Rule 45, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Various defendants which are parties to the federal asbestos Multidistrict Litigation proceeding (MDL 875) in Philadelphia issued two Rule 45 document subpoenas from the federal district court in Houston, Texas, and served them on Petitioner Occupational Medical Resources, Inc. ("OMR"). Within the time permitted by Rule 45, the Individual Petitioners, who are persons whose medical and other private records are the objects of the subpoenas, filed motions to intervene and to quash the subpoenas. OMR filed motions to quash as well. The Houston federal court opened two miscellaneous proceedings, one for each subpoena. Neither the Individual Petitioners nor OMR are parties to any case in MDL 875.

On September 20, 2006, the Houston district court entered identical orders in both miscellaneous proceedings that ordered, *inter alia*, that: "All future pleadings in this case be filed in MDL 875." Petitions for writs of mandamus were then filed by the Individual Petitioners and OMR in the Fifth Circuit Court of Appeals, which court had jurisdiction over those petitions pursuant to 28 U.S.C. § 1651.[1] On February 8, 2007, a panel of the Fifth Circuit issued an opinion which denied the writs. Timely motions for rehearing by the panel and by the court *en banc* were filed on February 21, 2007. On March 27, 2007, the Court of Appeals issued an order which denied the motions for rehearing, with one member of the panel dissenting from denial of the motion for panel rehearing.

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[1] *See, e.g., In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) ("Mandamus is appropriate 'when the trial court has exceeded its jurisdiction *or has declined to exercise it.*") (emphasis added).

REASONS FOR GRANTING THE WRIT

First, the 2-1 opinion of the Fifth Circuit, contrary to the plain language of Rule 45, allows a motion to quash a Rule 45 subpoena filed in the issuing court to be transferred to another federal court, and thus conflicts with the decision of the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998).

Second, the *ratio decendi* of the panel opinion was that 28 U.S.C. § 1407(b) trumps the restrictions of Rule 45 because multidistrict litigation judges can preside over a "pretrial deposition" in any district. Yet, no "pretrial deposition" was at issue here; only subpoenas for document production. Therefore, the Fifth Circuit opinion conflicts with this Court's "plain meaning rule" cases such as *United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989) and with *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1997), where this Court applied the "plain meaning rule" to Section 1407.

Since these conflicts are interrelated, they are discussed in that same manner. That is, because the Fifth Circuit ignored this Court's statutory interpretation jurisprudence, and in conflict with those authorities equated a "document subpoena" to a "pretrial deposition," the Fifth Circuit reached an erroneous conclusion that conflicts with the District of Columbia Circuit's opinion and with the plain language of Rule 45.

ARGUMENT

The panel opinion allows a document subpoena proceeding to be "relocated" from the issuing district court in Houston, Texas to the MDL court in Philadelphia, Pennsylvania in violation of Rule 45(c)(3)(A), FED. R. CIV. P., as authoritatively interpreted by the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998).

In 1991, this Court and Congress wrought significant changes to Rule 45. According to the Advisory Committee, one purpose of the 1991 amendments was "to clarify *and enlarge* the protections afforded persons who are required to assist the court by giving information or evidence." Now, where a third-party seeks protection from the issuing court, the text of the Rule gives *only* that court the power and the duty to enforce or protect. Rule 45(c)(3)(A), FED. R. CIV. P. ("the court by which a subpoena was issued shall quash or modify the subpoena.")

Accordingly, in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), the District of Columbia Circuit held that the plain meaning of Rule 45 does not permit a court to transfer a subpoena proceeding:

> The place to start . . . is the text of Rule 45. That text offers no authorization to transfer a motion to quash and seems at least implicitly to forbid it. The rule permits, and in some circumstances requires, "the issuing court" to quash or modify a subpoena. *See* Fed.R.Civ.P. 45(c)(3)(A). It allows enforcement of a subpoena following objections only "pursuant to an order of the court by which the subpoena was issued." Fed.R.Civ.P. 45(c)(2)(B). It provides that failure to obey a subpoena may be deemed contempt "of the court from which the

> subpoena issued." Fed.R.Civ.P. 45(e). All of this language suggests that only the issuing court has the power to act on its subpoenas. Subpoenas are process of the issuing court, and nothing in the Rules even hints that any other court may be given the power to quash or enforce them.

In re Sealed Case, 141 F.3d at 341 (case citations omitted).

The Fifth Circuit held, however, that 28 U.S.C. § 1407(b) trumped the geographic protections given to subpoenaed third-parties, and allowed the miscellaneous subpoena proceedings to be litigated not in the issuing court in the Southern District of Texas, but in MDL 875 a thousand miles away in the Eastern District of Pennsylvania. The Fifth Circuit opinion crashed through many legal roadblocks on its way from Texas to Pennsylvania, not the least of which is the plain language of both Rule 45 and Section 1407(b). As the District of Columbia Circuit held, Rule 45(c)(3)(A) could not be any clearer; only an issuing court can address a motion to quash filed there by a third-party. According to the Fifth Circuit, however, a passage from Section 1407(b) instead allows a multidistrict litigation court to address an issuing court's document subpoena: "The judge . . . to whom such actions are assigned . . . may exercise the powers of a district judge in any district *for the purpose of conducting pretrial depositions* in such coordinated or consolidated pretrial proceedings." (emphasis added). Therefore, the Fifth Circuit's opinion ignored the "plain meaning rule" and failed also to explain why the plain meaning of Section 1407(b) could legitimately be ignored.

This Court's plain meaning rule jurisprudence is well-developed. In determining a statute's plain meaning, courts must assume that "Congress intends the words in its enactments to carry their ordinary, contemporary,

common meaning." *Pioneer Investment Services v. Brunswick Associates*, 507 U.S. 380, 388 (1993). As this Court has also stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (internal quotation marks omitted). Significantly, if the language of the statute is clear, "the inquiry should end." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). It has never been suggested, even by the authorities cited by the Fifth Circuit majority, that "pretrial deposition" and "document subpoena" are synonymous. Such a suggestion would be silly, and therefore unless the plain meaning rule were for some reason not applicable, "the inquiry should end." *Ron Pair,* 489 U.S. at 241. Since the plain meaning of Section 1407(b) does *not* grant an MDL judge the power to adjudicate remote Rule 45 document subpoenas served on third-parties, Rule 45(c)(3)(A), FED. R. CIV. P. controls, and Rule 45 permits *only* the issuing court to act on motions to quash such subpoenas.

No exception to the plain meaning rule applies to this portion of Section 1407(b). This is not, in other words, one of "the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Ron Pair*, 489 U.S. at 242 (internal quotes, brackets and citations omitted). Nothing in the legislative history of Section 1407(b) indicates Congress *really* intended to say "The judge . . . to whom such actions are assigned . . . may exercise the powers of a district judge in any district for the purpose of conducting *all pretrial discovery proceedings* in such coordinated or consolidated pretrial proceedings." Indeed, Congress used

the term "pretrial proceedings" rather liberally throughout Section 1407, making it all the more apparent that Congress was drafting with care when choosing for this one purpose the term "pretrial depositions." The House Report on the then-new Section 1407 confirms that Congress intended the result sought by the Petitioners, and certainly does not suggest that applying the plain meaning of the statute will create a result that is at odds with actual intent. As Congress stated: "The proposed new section 1407 establishes a Judicial Panel on Multidistrict Litigation which is empowered to . . . act as and designate other judges or ***deposition*** judges in any district." H.R. REP. 90-1130, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News 1898, 1968 WL 4929, *2 (Feb. 28, 1968).

Obviously, Congress was also familiar with the difference between a deposition and a document demand – Congress and this Court made separate rules for these different discovery mechanisms in the Federal Rules of Civil Procedure, and these different discovery mechanisms are addressed in different parts of Rule 45 as well. It is also clear that the drafters of the 1991 amendments to Rule 45 intended to provide non-parties with new geographic protections when burdened with document subpoenas. As the Advisory Committee Notes to the 1991 amendments stated, one purpose of the amendments to Rule 45 was "to clarify *and enlarge* the protections afforded persons who are required to assist the court by giving information or evidence."

In sum, there is absolutely no basis to apply an exception to the plain meaning rule to Section 1407(b). The legislative history of Section 1407 is consistent with and supports its plain meaning; certainly, there is no evidence of a legislative intent that is *contrary* to the plain

meaning of "pretrial depositions." In addition, the clear intent of the 1991 amendments to Rule 45 was to give new and greater geographic protections to non-parties served with document subpoenas. Taking all of this together, it is simply impossible to say that the plain meaning of Section 1407(b) is contrary to the will of Congress.

This Court has rejected pleas to ignore the plain meaning of Section 1407. In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1997), the Court made it clear that Section 1407(b) must be interpreted like any other statute, and it cannot be employed, even for supposedly salutary administrative purposes, in a manner that is contrary to its plain meaning. In *Lexecon*, the question was whether an MDL court could, by virtue of Section 1407, effect a "self-transfer" under Section 1404(a). At the time of the *Lexecon* decision, lower court jurisprudence permitted it, as did the Rules of the Judicial Panel itself. *Lexecon*, 523 U.S. at 32-33. This Court closely analyzed the text of Section 1407, which contained some support for the practice, but ultimately found that the "plain command" found in Section 1407(a) that "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated" precluded self-transfers. *Id.* at 35-37.

The primary teachings of *Lexecon* are, of course, that Section 1407 is not interpreted any differently that statutes generally, and there is nothing about Section 1407, its application or its legislative history that overrides its plain meaning. While that is certainly sufficient to grant the writ and require the Fifth Circuit to apply the statute as written, parallels between the issue in *Lexecon* and that

presented in the present case are significant. In *Lexecon*, the question was whether Section 1407 could be interpreted, contrary to its plain language (that the case must be remanded following pretrial proceedings), to permit the MDL court to take charge of a proceeding (the trial on the merits) which because of other federal rules or statutes (federal court venue and transfer statutes) could only take place in a different forum of the petitioner's choice (where petitioner filed the case). The plain meaning of course prevailed, maintaining the petitioner's forum choice over the attempt to use Section 1407 to lodge jurisdiction in the MDL court. Likewise, here, the issue is the same; can Section 1407 be interpreted, contrary to its plain language (MDL judges have extra-district jurisdiction only over "pretrial depositions"), to permit an MDL court to take charge of a proceeding (motion to quash a Rule 45 document subpoena) which because of other federal rules or statutes (Rule 45(c)(3)(A), FED. R. CIV. P.) can only take place in a different forum of the petitioner's choice (where the petitioner filed the motion to quash). Again, the plain meanings of both Section 1407 and Rule 45 preclude the MDL court from overriding the petitioners' forum choice.

Lexecon's final lesson is that in adhering to the statute's "plain command," the Court was not swayed by arguments that self-transfers would be good policy or wise judicial administration: It "may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue . . . but the proper venue for resolving that issue remains the floor of Congress." *Lexecon*, 523 U.S. at 40. If Congress wants to exempt third-parties subpoenaed for document production in Multidistrict Litigation cases from the geographic protections of Rule 45, it can easily

rewrite Section 1407 to do so. At present, however, document subpoenas served on third-parties are governed by Rule 45(c)(3)(A), not by Section 1407(b).

CONCLUSION

The court of appeals clearly erred by ignoring the plain meaning of Rule 45 and of Section 1407. As a result, it reached a result that conflicts with a decision of the District of Columbia Circuit. This Court should, therefore, grant this application for writ of certiorari, and reverse the Fifth Circuit and direct it to, as the minority opinion would, grant the petitions for writs of mandamus.

Respectfully submitted,

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478 F.3d 670

United States Court of Appeals, Fifth Circuit.
In Re: CLIENTS AND FORMER CLIENTS OF **BARON & BUDD**, P.C. and Occupational Medical Resources, Inc., Petitioners.
Nos. 06-20835, 06-20836
Summary Calendar.

Feb. 8, 2007

Alan B. Rich, Baron & Budd, Dallas, TX, for Petitioner Clients.

Austin H. England, Veon & England, Irving, TX, for Petitioner Occ. Med. Res. Inc.

Walter G. Watkins, Jr., Fred H. Krutz, III, Marcy B. Croft, Forman, Perry, Watkins, Krutz & Tardy, Jackson, MS, Roger Henry Nebel, Forman, Perry, Watkins, Krutz & Tardy, Houston, TX, for Respondent.

Petitions for Writs of Mandamus to the United States District Court for the Southern District of Texas.

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

Petitioners are Occupational Medical Resources, Inc. ("OMR"), and individuals whose records are in OMR's possession. Petitioners seek a writ of mandamus ordering the district court to rule on motions to intervene and motions to quash regarding a subpoena. We deny the petition.

I.

The respondents are defendants in matters pending in the Asbestos Multi-District Litigation Court No. 875 ("MDL 875") in the United States District Court for the Eastern District of Pennsylvania. Pursuant to Federal Rule of Civil Procedure 45, respondents issued a subpoena through the United States District Court for the Southern District of Texas for the production of documents and material from OMR. The individuals moved to intervene, and to quash the subpoena, in the Texas court. OMR also moved to quash in that court; its motion remains unresolved. The Texas court entered the order that is now being challenged; it (1) denied the individuals' motions and (2) directed that "[a]ll future pleadings in this case be filed in MDL 875." Petitioners complain only about the second part of the order.

II.

Petitioners rely largely on the text of rule 45(c)(3)(A), which states that "the court by which a subpoena was issued shall quash or modify the subpoena. . . ." To the same effect, rule 45(e) states that "[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Petitioners claim that by the text of these two provisions, only the Texas court may enforce the subpoena and protect parties from its terms.

Respondents answer that MDL proceedings are to be treated differently. They rely primarily on 28 U.S.C. § 1407(b), dealing with MDL proceedings, which provides that "[t]he judge to whom such [MDL] actions are assigned . . . may exercise the powers of a district judge in any

district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." The question of law that we must decide to evaluate the mandamus petition is whether the authority conferred on the MDL court by § 1407(b) extends beyond depositions so as to embrace the instant subpoenas.

III.

Based on the overwhelming weight of authority, we answer in the affirmative. A persuasive analysis is set forth in a leading treatise:

> A motion to quash or modify a subpoena is to be granted by "the court by which a subpoena was issued." If a subpoena is issued by a district court other than the one in which the case is pending . . . , the proper court in which to file a motion to quash or modify the subpoena is the issuing court, not the court in which the action is pending. . . .
>
> . . .
>
> Certain federal statutes create an exception to the rule that only the issuing court may quash, modify, or enforce a subpoena. For example, the multidistrict litigation (MDL) statute . . . authorizes a judge assigned an MDL action to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." [citing § 1407(b)]. This statute therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any

> district. Though the statutory language refers to "pretrial depositions," the statute wisely has been interpreted to embrace document production subpoenas as well.

9 James W. Moore et al., Moore's Federal Practice § 45.50, at 45-75 through 45-77 (Matthew Bender 3d ed.2006) (footnotes omitted). "In multidistrict litigation, the court in charge of the consolidated proceedings has the power to rule on a motion to quash subpoenas." 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2459, 2006 Supp., at 19 (West 1995). "The court in charge of consolidated proceedings has power to rule on a motion to quash subpoenas." *Id.* at 19 n. 14.2.

This conclusion is supported by the convincing analyses of myriad district courts. *E.g., In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 n. 5 (E.D.Pa.2005); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 270, 274-75 (D.D.C.2002); *In re Subpoenas Served on Wilmer, Cutler & Pickering & Goodwin Proctor LLP*, 255 F.Supp.2d 1, 1-3 (D.D.C.2003); *HCA, Inc. v. United States ex rel. Pogue*, 2002 WL 31953748, at *3-*4 (M.D.Tenn.2002); *In re Subpoena Issued to Boies, Schiller & Flexner LLP*, 2003 WL 1831426, at *1 (S.D.N.Y.2003). *VISX, Inc. v. Nidek Co.*, 208 F.R.D. 615, 616 (C.D.Cal.2002).

The petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: SUBPOENA ISSUED TO OCCUPATIONAL MEDIAL RESOURCES	§ § §	**CIVIL ACTION NO. H-06-MC-307**

ORDER

IT IS HEREBY ORDERED that Intervenors/Objectors' Motion to Intervene **(Instrument No. 3-1)** is **DENIED** and Intervenors/Objectors' Motion to Quash Subpoena **(Instrument No. 3-2)** is **DENIED as moot**. All future pleadings in this case should be filed in MDL 875.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 20th day of September, 2006, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: SUBPOENA ISSUED TO OCCUPATIONAL MEDIAL RESOURCES	§ § §	**CIVIL ACTION NO. H-06-MC-306**

ORDER

IT IS HEREBY ORDERED that Intervenors/Objectors' Motion to Intervene **(Instrument No. 3-1)** is **DENIED** and Intervenors/Objectors' Motion to Quash Subpoena **(Instrument No. 3-2)** is **DENIED as moot**. All future pleadings in this case should be filed in MDL 875.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 20th day of September, 2006, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

2007 WL 898820

United States Court of Appeals, Fifth Circuit.
In Re: CLIENTS AND FORMER CLIENTS OF **BARON & BUDD**, P.C. and Occupational Medical Resources, Inc., Petitioners.
Nos. 06-20835, 06-20836.

March 27, 2007.

Alan B. Rich, Baron & Budd, Dallas, TX, for Clients & Former Clients of Baron & Budd.

Austin H. England, Veon & England, Irving, TX, for Occ. Med. Resources, Inc.

Walter G. Watkins, Jr., Fred H. Krutz, III, Marcy B. Croft, Forman, Perry, Watkins, Krutz & Tardy, Jackson, MS, Roger Henry Nebel, Forman, Perry, Watkins, Krutz & Tardy, Houston, TX, for Respondent.

Petitions for Writs of Mandamus to the United States District Court for the Southern District of Texas; Vanessa D. Gilmore, Judge.

On Petition for Rehearing and Rehearing En Banc

Opinion Feb. 8, 2007, 5th Cir.,
478 F.3d 670 (5th Cir.2007)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED, and no member of this panel or judge in regular active service having requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED.

OWEN, Circuit Judge, dissenting from the denial of panel rehearing:

> After considering the relators' petitions for rehearing and more carefully examining the provisions of 28 U.S.C. § 1407, I am compelled to conclude that § 1407 does not authorize the court presiding over multidistrict litigation in the Eastern District of Pennsylvania to quash the subpoena issued by a district court in the Southern District of Texas. Accordingly, I conclude that the District Court for the Southern District of Texas abused its discretion in dismissing the motion to quash the subpoena as moot, in dismissing the motion to intervene as moot, and in entering a blanket order directing that all future pleadings should be filed in multidistrict litigation pending in the Eastern District of Pennsylvania. While § 1407 confers broad powers upon a transferee court in multidistrict litigation to conduct pretrial proceedings, it does not confer the power to issue, enforce, or quash a subpoena for the production of documents that is unrelated to a deposition and is directed to a party who is not subject to the subpoena power of the multidistrict litigation court. While I agree that it might be "wise" to treat document subpoenas in the same manner as depositions, Congress has not done so, and we are constrained by the limits of § 1407.

I

Defendants in multidistrict litigation pending in the Eastern District of Pennsylvania served Occupational Medical Resources, Inc. (OMR) with a subpoena issued from the Southern District of Texas seeking the production

of documents. OMR is not a party to the multidistrict litigation and has not been noticed for a deposition, nor has an OMR witness been subpoenaed for deposition. OMR provides x-ray services, and the subpoena sought OMR's records regarding numerous individuals who are not parties to the multidistrict litigation. OMR filed a motion to quash this subpoena with the district court that issued it, and many of the individuals whose records are at issue sought leave to intervene and to quash the subpoena, arguing that their personal information was not properly the subject of discovery.

The district court denied all relief. It entered an order directing: "All future pleadings in this case should be filed in MDL 875 [the multidistrict litigation in the Eastern District of Pennsylvania]." The court denied OMR's and its clients' motions to quash as moot and similarly denied the motion to intervene as moot. OMR and the other relators have asked this court to issue a writ of mandamus directing the district court to withdraw these orders and address the merits of the motions.

II

Section 1407 provides that when civil actions are transferred to a district by the judicial panel on multidistrict litigation, the purpose of the transfer is "for coordinated or consolidated pretrial proceedings" and to "promote the just and efficient conduct of such actions."[1] Undoubtedly, Congress intended that a judge who presides over multidistrict litigation is to have broad power to conduct pretrial proceedings:

[1] 28 U.S.C. § 1407(a) (2000).

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district

> judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.[2]

The term "pretrial proceedings" in § 1407(a) encompasses a broad range of pretrial matters, including most discovery issues,[3] and extends to dispositive motions.[4] However, Congress apparently did not think that it had granted a transferee district the power to issue subpoenas to non-parties who were not subject to that district's jurisdiction, or else it would not have included the following sentence in § 1407(b):

> The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial

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[2] *Id. See generaly In re The Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114 (6th Cir.1981) (discussing power of judge presiding over multidistrict litigation).

[3] *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir.2006) (observing that § 1407 "was meant to 'assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation'" and that "[w]ithout it, 'conflicting pretrial discovery demands for documents and witnesses' might 'disrupt the functions of the Federal courts' as they nearly had in the electrical equipment company cases.") (quoting H.R.Rep. No. 1130, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899).

[4] *Id.* at 1231-32 holding that the transferee court had authority to dismiss claims for failure to comply with case management orders); *In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir.1996); *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 367-68 (3d Cir.1993); *Humphreys v. Tann*, 487 F.2d 666, 668 (6th Cir.1973).

> depositions in such coordinated or consolidated pretrial proceedings.[5]

This sentence seems to recognize that consolidating actions from multiple districts into one district for pretrial purposes does not extend the transferee court's jurisdiction over non-parties. A transferee court cannot subpoena non-parties who are not subject to the transferee court's jurisdiction. If it could, the foregoing provision would be entirely unnecessary.

The provision in § 1407(b) was apparently deemed essential to permit a transferee judge to act within another district with regard to presiding over depositions, and even then, to act not as a judge in the multidistrict litigation transferee district, but as a judge in the district in which the witness was subject to jurisdiction. For the purpose of conducting pretrial depositions in a district other than the transferee district, the judges enumerated in § 1407(b) may act as district judges sitting in any district, as distinguished from transferee judges acting in the transferee district. This structure seems purposeful and deliberate. It indicates the intent to correspond with and complement, rather than disembowel, the Federal Rules of Civil Procedure regarding subpoenas of non-parties. Accordingly, a multidistrict litigation transferee judge may preside over the taking of depositions in a district other than the transferee district. But in this limited circumstance, the transferee judge will be acting

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[5] 28 U.S.C. § 1407(b) (2000).

as a member of the non-transferee district rather than a member of the transferee district.[6]

This court has so construed § 1407(b) on at least two occasions.[7] In *In re Corrugated Container Antitrust Litigation,* multidistrict litigation was pending in Texas, and a district court in the Southern District of New York issued a subpoena requiring a witness to appear for a deposition. After the witness refused to answer certain questions, the presiding judge of the multidistrict litigation held the witness in contempt. This court concluded that § 1407 "enabled Judge Singleton to preside over Fleischaker's deposition in New York," and that "[i]n ordering Fleischaker to respond and in holding him in contempt, Judge Singleton was exercising the powers of a district judge of the District Court for the Southern District of New York."[8] This court continued, "As the legislative history of section 1407 indicates, his actions were limited by the ordinary

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[6] *See In re Corrugated Container Antitrust Litig.,* 662 F.2d 875, 880-81 (D.C.Cir.1981); *In re Corrugated Container Antitrust Litig.,* 647 F.2d 460, 461 (5th Cir. Unit A May 1981) (holding that when the transferee judge from the Southern District of Texas entered an order of contempt for a non-party witness's failure to answer deposition questions, the transferee judge "was acting as a district judge sitting in the District of Columbia," where the witness was located and was deposed); *In re Corrugated Container Anti-Trust Litig.,* 620 F.2d 1086, 1090-91 (5th Cir.1980) (holding that "the only court that had the power to compel . . . a non-party deponent[ ] to answer questions at a deposition conducted in the Southern District of New York was the district court sitting in that district" and that transferee judge from the Southern District of Texas was acting as a district judge for the Southern District of New York in presiding over the deposition).

[7] *In re Corrugated Container Antitrust Litig.,* 647 F.2d at 461; *In re Corrugated Container Anti-Trust Litig.,* 620 F.2d at 1091.

[8] 620 F.2d at 1091.

operation of the Rules of Civil Procedure."[9] In a similar dispute the following year, this court held, "[W]hen Judge Singleton entered his order of contempt, he was acting as a district judge sitting in the District of Columbia."[10] While rulings of a multidistrict litigation court are reviewed by the circuit for the district to which the multidistrict litigation was transferred, rulings by a multidistrict judge sitting as a judge of another district when presiding over depositions are reviewed by the circuit for the district in which the subpoena issued.[11]

The District of Columbia Circuit has also explained the interplay between what it characterized as different grants of authority within § 1407:

> Section 1407, which established special procedures allowing the transfer of pretrial proceedings in multidistrict litigation, contains two kinds of authority. One is for the transfer of pending causes of action from one district to another district for pretrial purposes only. 28 U.S.C. § 1407(a). The judge who is assigned to preside over the transferred action exercises his authority as a member of the district court to which the action has been transferred. Congress believed that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases (could) be avoided or minimized by . . . centralized management. To accomplish this objection the (statute) provides for the transfer of

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[9] *Id.*

[10] *In re Corrugated Container Antitrust Litig.*, 647 F.2d at 461.

[11] *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 880-81; *In re Corrugated Container Antitrust Litig.*, 647 F.2d at 461; *In re Corrugated Container Anti-Trust Litig.*, 620 F.2d at 1090.

> venue of an action for the limited purpose of conducting coordinated pretrial proceedings.
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> * * *

The second grant of authority in section 1407 is of a different sort. It grants to the judges who have been assigned multidistrict litigation the powers of a district judge in other districts in order to supervise depositions being conducted in those other districts. 28 U.S.C. § 1407(b). . . . The deposition proceedings remain anchored in the courts of the districts where they are being conducted, but because of the obvious policy reasons for allowing a single judge to preside over the disparate activity in a multidistrict case, . . . the multidistrict judge is granted the same powers as a judge of those courts where the depositions are being taken.[12]

That circuit court noted, "It seems eminently reasonable that the rules governing deposed non-party witnesses should be determined by the jurisdiction in which they may be deposed rather than by a distant place in which the multidistrict litigation is pending."[13] That court also observed that the district in which the multidistrict litigation was pending, the Southern District of Texas, did not have jurisdiction over the non-party witness, who resided in the vicinity of the District of Columbia, and that "a subpoena could only have issued in or near the District of Columbia and only a judge in the district where the

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[12] *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 880-81 (citations omitted, alterations in original).

[13] *Id.* at 881 n. 11.

deposition is taken, not where the litigation is pending, could hold appellant in contempt."[14]

Notably, the provision in § 1407(b) authorizing a multidistrict litigation judge to exercise power as another district judge in any district is limited to depositions. This provision does not give the same authority with regard to document subpoenas that are unrelated to any deposition. We cannot assume such an omission is an oversight or an error on the part of Congress. Congress is presumed to know the difference between depositions and subpoenas seeking the production of documents, and that the Rules of Civil Procedure separately delineate the attributes of each.[15]

The upshot is that the judge presiding over the multidistrict litigation in Pennsylvania or another judge designated under § 1407(b) could act as a judge in the Southern District of Texas and rule on the subpoena issued to OMR if that subpoena related to a deposition. But the subpoena does not pertain in any manner to a deposition. Therefore, the only judges who may resolve the issues raised are those within the Southern District of Texas. Rule of Civil Procedure 45 provides, "On timely motion, *the court by which a subpoena was issued* shall quash or modify the subpoena"[16] and, "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt *of the court from which the subpoena issued.*"[17]

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[14] *Id.* at 882.

[15] *See* Fed.R.Civ.P. 45.

[16] Fed.R.Civ.P. 45(c)(3)(A) (emphasis added).

[17] Fed. R. Civ. P. 45(e) (emphasis added).

Because I cannot ignore the language chosen in § 1407 or engraft additional language, I must respectfully dissent.

Federal Rules of Civil Procedure

Rule 45. Subpoena

* * *

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises – or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except

pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

* * *

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

28 U.S.C. § 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any

district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

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